

United States Bankruptcy Court  
Eastern District of Michigan  
Southern Division

In re:

Delores J. Regan,

Debtor.

Case No. 04-64454-R

Chapter 7

George P. Dakmak, Trustee,

Plaintiff,

v.

Adv. No. 04-4990

First Franklin Financial Corp.,

Defendant.

Opinion Regarding Trustee's  
Motion for Summary Judgment

I.

On October 25, 2002, the debtor granted a mortgage in favor of First Franklin Financial Corp. in the amount of \$115,000 on her property located at 912 Rowland Rd., Leonard, MI. The mortgage was never recorded. Instead, an Affidavit of Lost Mortgage was provided to the Oakland County Register of Deeds, which date-stamped the affidavit on June 8, 2004. The debtor filed for chapter 7 relief on August 30, 2004.

On November 4, 2004, the trustee filed this complaint against First Franklin under 11 U.S.C. § 544(a)(3). In the trustee's amended complaint, filed on March 16, 2005, the trustee asserts that the filing of the Affidavit of Lost Mortgage constituted a transfer of an interest in property to the defendant on that date pursuant to § 547(e)(2). The trustee has filed a motion for summary judgment

asserting that there are no genuine issues of material fact and that he is entitled to judgment. First Franklin opposes the motion.

## II.

The trustee contends that the Affidavit of Lost Mortgage is a transfer that is avoidable under § 547(b) because it was recorded on June 8, 2004, within 90 days of the petition. The trustee asserts that under § 547(e)(2)(B), the transfer was made at the time it was perfected. The trustee contends that the transfer was made to or for the benefit of a creditor, on account of an antecedent debt, and enabled the defendant to receive more than it would have in a chapter 7 proceeding.

First Franklin contends that the Affidavit of Lost Mortgage was prepared on October 28, 2003, and was presented to the Register of Deeds for recording on November 4, 2003. First Franklin argues that the date it was presented to the Register of Deeds is the date it was deemed recorded, not the date that was stamped on the document. Because the Affidavit of Lost Mortgage was presented to the Register of Deeds more than 90 days before the bankruptcy petition was filed, First Franklin contends that it is not avoidable under § 547(b).

## III.

For purposes of § 547, the timing of a transfer is set by application of § 547(e)(2). A transfer occurs:

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of-

- (I) the commencement of the case; or
- (ii) 10 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2).

Section 547(e)(1)(A) addresses when perfection occurs with respect to real property:

[A] transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee . . . .

11 U.S.C. § 547(e)(1)(A).

In Michigan, perfection occurs upon recording. “Every conveyance of real estate within the state . . . which shall not be recorded . . . shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.” M.C.L.A. § 565.29 (West 1988).

M.C.L.A. § 565.24 provides, in part, “Every register of deeds shall keep an entry book of deeds and an entry book of mortgages[.]”

M.C.L.A. § 565.25(1) provides in part, “In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities.”

Finally, M.C.L.A. § 565.25(4) provides, in part, “The instrument shall be considered as recorded at the time so noted[.]”

The Affidavit of Lost Mortgage is dated October 23, 2003. First Franklin asserts that it was

delivered to the Oakland County Register of Deeds on November 4, 2003. The date stamped on the document by the Register of Deeds is June 8, 2004.

However, the critical date under the applicable statutes is the date of entry into the entry book of mortgages. There has been no evidence presented from which the Court can determine that date, or whether such book is even maintained by the Register of Deeds as required by M.C.L.A. § 565.24. Accordingly, the Court concludes that there is a genuine issue of material fact as to when the Affidavit of Lost Mortgage was recorded. The Trustee's motion for summary judgment is therefore denied.

The Court will enter an appropriate order.

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Steven Rhodes  
Chief Bankruptcy Judge

Entered: June 24, 2005

cc: Jeffrey H. Bigelman  
David Lerner

Not for Publication